88-577 (1)

NO. 88-

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ISSA ELIAS SAMAAN,

Petitioner,

v.

F. NIAKAN, E. NIAKAN, BEN NIAKAN,
BOB NIAKAN, BETTY NIAKAN, and
UNION OIL COMPANY OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

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September 30, 1988

QUESTIONS PRESENTED

1. Do the state courts have concurrent jurisdiction over claims arising under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801 et seq.?

2. Even if federal court jurisdiction over PMPA is found to be exclusive, cannot Petitioner's PMPA claims be raised in state court as a matter of defense?

3. Are Petitioner's various state law claims preempted by PMPA?

4. Whether Petitioner's claims are meritorious assuming that concurrent state court jurisdiction exists?

PARTIES TO THE PROCEEDINGS BELOW

The parties to this proceeding are plaintiffs/cross-defendants F. Niakan, E. Niakan, Ben Niakan, Bob Niakan, and Betty Niakan; defendant/cross-complainant Issa Elias Samaan; and defendant/cross-defendant Union Oil Company of California.

In addition, William Sheffield and Mary Sheffield were named as cross-defen-

dants below. They were dismissed following the granting of a motion for summary judgment.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW . . . i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

OPINIONS BELOW 7

JURISDICTIONAL STATEMENT 7

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 9

STATEMENT OF THE CASE 10

A. Statement of Facts 10

B. History of the Litigation . . 14

SUBSTANTIALITY OF FEDERAL QUESTIONS . . 18

I. THE ISSUE OF CONCURRENT JURISDICTION 18

II. FEDERAL QUESTIONS MAY BE RAISED COLLATERALLY AS A MATTER OF DEFENSE 40

III. PETITIONER'S STATE LAW CLAIMS ARE NOT PREEMPTED BY PMPA 42

IV. WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE DIRECTED VERDICTS AGAINST THIS PETITIONER. 53

CONCLUSION 59

APPENDIX A. APP-1

APPENDIX B. APP-12

APPENDIX C. APP-13

APPENDIX D. APP-14

APPENDIX E. APP-41

APPENDIX F. APP-42

APPENDIX G. APP-44

TABLE OF AUTHORITIES

Cases:

Abadjian v. Gulf Oil Corp., 602 F. Supp. 874 (C.D. Cal. 1983) . 34, 42

Adams v. Iowa Oil Co., Bus. Fran. Guide (CCH), ¶ 8008 (Iowa S. Ct. 1983) 38

Aetna State Bank v. Altheimer, 430 F.2d 750 (7th Cir. 1970) 5, 41

American Well Works v. Layne & Bowler Co., 241 U.S. 257 (1916) 5

ARCO Petroleum Products Co. v. Williams, 146 Ill. App. 3d 218, 496 N.E.2d 1098 (1986) 38

Barnes v. Gulf Oil Corp., 795 F.2d 358 (4th Cir. 1986) 51

Bates v. Chevron USA, Inc., 151 Ga. App. 544, 260 S.E.2d 367 (1979) 38

Bellmore v. Mobil Oil Corp., 783 F.2d 300 (2d Cir. 1986) 3, 4, 43-45, 49-51

Berg v. Watson, 417 F. Supp. 806 (S.D.N.Y. 1976) 22

Blankenship v. Atlantic Richfield Co., 478 F. Supp. 1016 (D. Or. 1979) 54, 58

Brach v. Amoco Oil Co., 677 F.2d 1213 (7th Cir. 1982) 26

Brown v. Pitchess, 13 Cal. 3d 518, 531 P.2d 772, 199 Cal. Rptr. 204 (1975) 31-33

California Arco Distributors, Inc. v. Atlantic Richfield Co., 158 Cal. App. 3d 349, 204 Cal. Rptr. 743 (1984) 33

Cason v. Texaco, Inc., 621 F. Supp. 1518 (M.D. La. 1985) 51

Cianci v. Superior Court, 40 Cal. 3d 903, 710 P.2d 375, 221 Cal. Rptr. 575 (1985) 27, 33

Consumers Petroleum of Connecticut, Inc. v. Duhan, 38 Conn. Super. 495, 452 A.2d 123 (1982) 38

DaCosta's Automotive Inc. v. Birchwood Plaza Shell, Inc., 106 A.D.2d 484, 482 N.Y.S.2d 832 (1984) 38

Davis v. Gulf Oil Corp., 485 A.2d 160 (D.C. App. 1984) 38

Dice v. Akron, Canton & Youngstown Ry. Co., 342 U.S. 359 (1952) 39

DiNapoli v. Exxon Corp., Bus. Fran. Guide (CCH), ¶ 7818 (D.N.J. 1982) . 49, 51

Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) 3, 22, 27

Elimelekh v. Texaco, Inc., Bus. Fran. Guide (CCH), ¶ 8663 (C.D. Cal. 1986) 18, 19

ERA Enterprises, Inc. v. Gulf Oil Corp., 506 So. 2d 160 (La. App. 1987) . 38

Ernst Enterprises, Inc. v. Sun Valley Gasoline, Inc., 139 Cal. App. 3d 355, 188 Cal. Rptr. 641 (1983) 55

Esso Standard Oil Co. v. Department of Consumer Affairs, 793 F.2d 431 (1st Cir. 1986) 51

Exxon Corp. v. Georgia Ass'n of Petroleum Retailers, 484 F. Supp. 1008 (N.D. Ga. 1979) aff'd, 644 F.2d 1030 (5th Cir.), cert. denied, 454 U.S. 932 (1981) 52

Frankard v. Amoco Oil Co.,
116 Wis. 2d 254, 342 N.W.2d 247 (1983) 38

Gulf Offshore Co. v. Mobil Oil Corp.,
453 U.S. 473 (1981) 3, 20, 21, 41

Hanes v. Mid-American Petroleum, Inc.,
577 F. Supp. 637 (W.D. Mo. 1983) . . . 51

Hartman v. Shell Oil Co., 68 Cal.
App. 3d 240, 137 Cal. Rptr. 244 (1977) 59

Hathorn v. Lovorn, 456 U.S. 255 (1982)5, 41

Jiminez v. B.P. Oil, Inc., 652 F.
Supp. 329 (D. Md. 1987) 52

Johnson v. Mobil Oil Corp.,
364 Pa. Super. 275, 528 A.2d
155 (1987) 2-4, 30, 36, 37, 49

Khorenian v. Union Oil Co. of
California, 761 F.2d 533
(9th Cir. 1985) 26, 54

L.C. Williams Oil Co., Inc.
v. Exxon Corp., 627 F. Supp. 864
(M.D.N.C. 1985) 51

Lane v. Central Bank of Alabama,
756 F.2d 814 (11th Cir. 1985) 22

Lanham v. Amoco Oil Co., 481 F.
Supp. 405 (D. Md. 1979) 34

Lasko v. Consumers Petroleum of
Connecticut, Inc., 547 F.
Supp. 211 (1981) 51

Lippo v. Mobil Oil Corp., 776 F.2d
706 (7th Cir. 1985) 3, 43, 45-49

Lou v. Belzberg, 834 F.2d 730
(9th Cir. 1987) 34

Lyons v. Mobil Oil Corp., 526 F. Supp. 961 (D. Conn. 1981) 51, 55

Lyons v. Mobil Oil Corp., 554 F. Supp. 199 (D. Conn. 1982) . . . 55

Niakan v. Samaan, 199 Cal. App. 3d 716, 245 Cal. Rptr. 34 (1988) . . 7, 30

Pro Sales, Inc. v. Texaco, Inc., 792 F.2d 1394 (9th Cir. 1986) 51

Ricco v. Shell Oil Co., 180 N.J. Super. 399, 434 A.2d 1151 (1981) . 38, 52

Roberts v. Amoco Oil Co., 740 F.2d 602 (8th Cir. 1984) 55

Rustom v. Atlantic Richfield Co., 618 F. Supp. 210 (C.D. Cal. 1985) 2-4, 18, 19, 30, 35, 36, 39

Sun Refining & Marketing Co. v. D'Arpino, 112 F.R.D. 668 (S.D.N.Y. 1986) 2, 35

Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc., 711 F.2d 138 (9th Cir. 1983) 54

Ted's Tire Service, Inc. v. Chevron USA, Inc., 470 F. Supp. 163 (D. Conn. 1979) 2, 21, 28-30, 33, 36, 51

Testa v. Katt, 330 U.S. 386 (1947) . . 31

Thomas v. Amoco Oil Co., 455 So. 2d 1187 (La. App. (1984) . . . 38

Waldron v. McAtee, 723 F.2d 1348, 1352 (7th Cir. 1983) 31

Walters v. Chevron USA, Inc., 154 Ga. App. 636, 269 S.E.2d 495 (1980) 38

Weiner v. Shearson, Hammill & Co., Inc., 521 F.2d 817 (9th Cir. 1975) 41

Wojciechowski v. Amoco Oil Co., 483 F. Supp. 109 (E.D. Wis. 1980) . . . 59

Worldwide Church of God v. McNair, 805 F.2d 888 (9th Cir. 1986) 31

Statutes and Rules:

15 U.S.C. §§ 2801 et seq. . . i, 9, 11, 16

15 U.S.C. § 2802(b)(2)(C) 45, 56

15 U.S.C. § 2802(b)(2)(C)(I) . . . 16, 56

15 U.S.C. § 2802(b)(3)(D)(iii) 57

15 U.S.C. § 2802(b)(3)(D) 56

15 U.S.C. § 2802(c)(4)(B) 16, 56

15 U.S.C. § 2802(c)(4) 16

15 U.S.C. § 2802(c)(10) 46

15 U.S.C. § 2804(b)(2)(B) 23

15 U.S.C. § 2804(c) 16, 57

15 U.S.C. § 2805 25

15 U.S.C. § 2805(a) 9, 21, 22, 28

15 U.S.C. § 2805(c) 25, 54

15 U.S.C. § 2805(d)(1)(B) 25

15 U.S.C. § 2806 9

15 U.S.C. § 2806(a) 22

28 U.S.C. § 1257 7

28 U.S.C. § 1343(3) 31

28 U.S.C. § 1441 (amended 1986) 9

Cal. Bus. & Prof. Code § 20999.1 . . . 44

Supreme Court Rule 17.1(b) 7

Supreme Court Rule 17.1(c) 7

U.S. Const., art. 6, cl. 2 9

U.S. Const., art. I, § 8 9

Other Authorities:

13 Wright, Miller & Cooper, Federal Practice and Procedure, § 3527, 245 & 246n.23 29

Alexander Hamilton's The Federalist No. 82 36

H.R. Rep. No. 95-161, 95th Cong. 1st Sess. 14 19

Redish & Muench, Adjudication of Federal Causes of Action in State Court, 75 Mich. L. Rev. 311, 325n.63 (1976) 20

S. Rep. No. 95-731, 95th Cong., 2d Sess. 16, reprinted in 1978 U.S. Code Cong. & Ad. News 873, 874 19, 25, 50, 52

IN THE
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ISSA ELIAS SAMAAN,

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F. NIAKAN, E. NIAKAN, BEN NIAKAN,
BOB NIAKAN, BETTY NIAKAN, and
UNION OIL COMPANY OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

Issa Elias Samaan respectfully petitions this Court for issuance of a Writ of Certiorari as follows:

INTRODUCTION

The California Court of Appeal dismissed Petitioner's entire appeal for lack of subject matter jurisdiction -- an argument raised by Union Oil for the first time

on appeal -- based upon the authority of Rustom v. Atlantic Richfield Co., 618 F. Supp. 210 (C.D. Cal. 1985).

As discussed infra, Rustom and Niakan are ill-considered rulings that are contrary to the majority of courts that have found the existence of concurrent PMPA jurisdiction, see, e.g., Sun Refining & Marketing Co. v. D'Arpino, 112 F.R.D. 668, 670 (S.D.N.Y. 1986); Ted's Tire Service, Inc. v. Chevron USA, Inc., 470 F. Supp. 163, 165 (D. Conn. 1979); Johnson v. Mobil Oil Corp., 364 Pa. Super. 275, 528 A.2d 155, 163-165 (1987), or otherwise assumed the existence of concurrent jurisdiction.

The appellate opinion below constitutes a double-barreled assault upon the long established doctrine that state courts are fully capable of enforcing federally created rights in the absence of an unequivocal Congressional intention to create exclusive jurisdiction. Nothing in our concept of a federal system prevents state

courts from enforcing rights created by federal law. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981); Dowd Box Co. v. Courtney, 368 U.S. 502 (1962). The decision below creates a clear conflict among existing federal and state case law and makes the need for the Highest Court's intervention especially acute at this juncture.

To find that the state courts lack jurisdiction over Petitioner's claims, the California Court of Appeal was tacitly required to extend Rustom to a perverted extreme -- the state courts not only lack jurisdiction to consider Petitioner's federal PMPA claims, they also lack the authority to adjudicate state law claims, which according to the Court of Appeal, are preempted by PMPA. The ruling on the preemption issue is particularly anomalous considering the contrary result reached by Bellmore v. Mobil Oil Corp., 783 F.2d 300 (2d Cir. 1986); Lippo v. Mobil Oil Corp.,

776 F.2d 706 (7th Cir. 1985); and Johnson v. Mobil Oil Corp., 364 Pa. Super. 275, 528 A.2d 155, 158-163 (1987).[1] As the Second Circuit held in Bellmore, it would be directly contrary to the intended Congressional purpose for a court "to read [PMPA] expansively" so as to interfere with the right of a state to provide legal redress to its citizens for wrongdoing "in areas that Congress left to the control of the states." 783 F.2d at 305.

Further, the decision below ignores the fact that Petitioner was involuntarily named as a defendant in this action and had no opportunity to select a federal forum. Because Petitioner's PMPA cross-claims were compulsory as to the plaintiffs -- who are alleged by Petitioner to have conspired with respondent Union Oil to deprive him of

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[1] Johnson, supra, contains an extremely able and well considered discussion of both the PMPA jurisdictional and preemption issues, including a careful analysis and rejection of the Rustom logic.

various statutory and contractual rights -- the state court was the only possible forum for resolution of the claims presented. Even where a statute clearly creates exclusive federal jurisdiction, a state court is duty bound to resolve all such federal questions where they "are introduced by way of [affirmative] defense, and failure to do so would violate the supremacy clause." Aetna State Bank v. Altheimer, 430 F.2d 750, 754 (7th Cir. 1970); accord, Hathorn v. Lovorn, 456 U.S. 255, 266 & 266-67n.18 (1982). Indeed, state court was the only place that Petitioner's defenses could be asserted since a defendant may not remove a state case based upon a federal defense. See, e.g., American Well Works v. Layne & Bowler Co., 241 U.S. 257 (1916).

Where existing federal and state case authorities are hopelessly split, a pronouncement should necessarily come from this Court in order to provide effective guidance to the hundreds, if not thousands,

of litigants and their legal counsel who may from time to time need to deal with claims under PMPA. The availability of a state court forum is of particular importance to service station dealers in remote areas far from federal courthouses and those who may have filed claims under PMPA in state court, in reliance upon the pre-existing case authority upholding the existence of concurrent jurisdiction, only to be met, after having expended considerable time and money (as in the case at bar), with the decision herein.

Finally, the serious errors of law in this case have ruined the life of this Petitioner -- by depriving him of his only source of livelihood -- and threaten to adversely affect thousands of petroleum dealers nationwide. This Court should intervene not only to correct those errors but also because this case presents compelling constitutional and statutory issues of

exceptional importance to the courts and to the public.[2]

OPINIONS BELOW

The opinion below was filed by the California Court of Appeal on February 16, 1988 and is published as Niakan v. Samaan, 199 Cal. App. 3d 716, 245 Cal. Rptr. 24 (1988).

A Petition for Hearing to the California Supreme Court was denied on May 4, 1988, with Justices Mosk and Broussard dissenting.

JURISDICTIONAL STATEMENT

Petitioner filed his notice of entry of appearance and application for extension of time with this Court on July 19, 1988. An extension of time has been granted until October 1, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 and

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[2] The instant petition is directly related to the issues raised in the Petition for Writ of Certiorari presently pending before this Court in Kreisher v. Mobil Oil Corp.

Supreme Court Rules 17.1(b) and 17.1(c).

Since its enactment ten years ago in 1978, the numerous federal and state courts that have considered PMPA have irreconcilably split as to two critical issues -- the existence of state court jurisdiction and the extent to which PMPA preempts a petroleum dealer's right to relief under state law.

This Court has never previously accepted review of a case under PMPA, a heavily litigated remedial statute that affects thousands of oil companies, petroleum wholesalers, and petroleum retailers nationwide. Only this Court can act to resolve these issues and eliminate the existing split of authority.

Because this case arises out of a state court appeal following a lengthy trial, it squarely presents this Court with a unique opportunity to resolve both the jurisdictional and preemption issues on a completed record. Ten years after enactment

of the controlling statute, there is no reason for the lower federal and state courts to be continuously arriving at widely different results as to the critical issues of concurrent jurisdiction and preemption.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first and third questions presented as to whether concurrent state court jurisdiction exists to consider PMPA claims, either by granting affirmative relief or defensively, involve the federal supremacy clause, U.S. Const., art. 6, cl. 2, and 15 U.S.C. § 2805(a).

The second question involves the federal supremacy clause, supra, and the removal statute, 28 U.S.C. § 1441 (amended 1986).

The third question presented relating to preemption involves the interstate commerce clause, U.S. Const., art. I, § 8, and 15 U.S.C. § 2806.

The fourth question concerns the substantive merits of the various claims raised by Petitioner under PMPA, 15 U.S.C. §§ 2801 et seq., and various state law claims.

The provisions of these consitutional and statutory authorities have been included in the appendix.

STATEMENT OF THE CASE

A. Statement of Facts.

In 1963, Union Oil leased a service station site at 11859 Wilshire Boulevard in Los Angeles from the Sheffields and constructed a Union Oil station on the site. The original term of the lease expired on April 30, 1979. The lease contained options to extend the lease for two five-year periods. Union Oil subsequently exercised the first of its two options to extend the site lease. The new expiration date was scheduled for April 30, 1984. The Sheffields subsequently sold the site to the Niakans.

On July 15, 1977, Union entered into a franchise agreement with Petitioner which included a sublease of the same service station site. This franchise was subject to the provisions of PMPA, which prohibits the termination or nonrenewal of an existing petroleum franchise absent the existence of certain statutory grounds and the franchisor's strict compliance with the mandated notification procedures. 15 U.S.C. §§ 2801 et seq. In addition, Petitioner was informed by Union when he purchased the service station, and on numerous occasions thereafter, that he could expect to remain at the site until Union's tenancy rights expired on April 30, 1989.

The sublease was for a three-year period ending July 14, 1980. On September 30, 1980, Union Oil and appellant entered into another three-year franchise which, by its terms, commenced on September 15, 1980 and expired on September 30, 1983. When these franchise documents were delivered to Peti-

tioner for signature, he was given written notice that the site lease would not expire until April 30, 1984.

The written agreements formalizing Samaan's most recent franchise consisted of a Retail Dealer Motor Fuel Purchase Contract (the "product supply agreement") and a Service Station Lease (the "sublease"). Consistent with Union's standard practice, the franchise was for a period of three years. (R.T. 48-49, 486-87, 735, 860).

At the time that this franchise agreement was signed, Union also delivered to Samaan a "State of California Disclosure Information" letter (Trial Ex. 3), which provided:

> Term. This Lease is for a period of three years. Lessee's tenancy at the station shall be renewed by Union at the expiration date, unless this Lease has been terminated prior to the expiration date pursuant to the provisions of Paragraph 10, 11, or 12.

(Emphasis added.)

In August 1981, Union Oil entered into a settlement agreement with the Sheffields and Niakans in order to settle a lawsuit brought by the Sheffields in 1977. The Sheffield suit claimed retroactive rental increases were due under the site lease. Under the terms of the settlement, Union relinquished its option to extend the site lease for an additional five-year term and agreed to prematurely terminate Samaan's franchise rights as of September 30, 1983, seven months prior to the date that had been promised to Petitioner in Union's Lease Disclosure Statement.

Petitioner did not receive notice of this settlement (nor, for that matter, had Petitioner been told by Union of the existence of the Sheffield litigation when he purchased the service station) and did not learn about the settlement until June 1982,

from the Niakans' attorney.[3] Up to that time, Petitioner understood the site lease was due to expire on April 30, 1984, and that it would be extended by Union until April 30, 1989.

Petitioner did not receive a formal notice of nonrenewal from Union until May 31, 1983, or 685 days after Union had made its decision not to renew Petitioner's franchise.

B. History of the Litigation.

The instant litigation was commenced by the Niakans against Petitioner and Union in the Los Angeles Superior Court in November 1982 for declaratory relief, slander of title, and injunctive relief.

Petitioner filed an answer asserting PMPA as an affirmative defense and also a cross-complaint against the Niakans and Union on January 18, 1983. An amended

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[3] Union has conceded that this type of information concerning a franchisee's tenancy rights should have been routinely communicated to a dealer. (R.T. 922).

cross-complaint was filed on February 22, 1983. A second amended cross-complaint (hereinafter "cross-complaint") was filed on June 6, 1983, following Petitioner's receipt of the formal Notice of Nonrenewal of his franchise from Union on May 31, 1983. Both Petitioner's affirmative defenses and cross-complaint raise federal issues under PMPA.

The first cause of action of the cross-complaint was brought against Union and the Niakans for violations of PMPA, including conspiring to violate Petitioner's statutory and contractual rights, as a result of Union's nonrenewal of Petitioner's franchise. The cross-complaint also contains state law causes of action for unfair business practices, breach of the implied covenant of good faith, breach of contract, and misrepresentation.

Prior to trial a preliminary injunction was issued by stipulation of the parties on October 14, 1983 (C.T. 100-03; R.T.

288, 413). This preliminary injunction enjoined Union and the Niakans from terminating or interfering with Petitioner's franchise pending trial.

Union argued at trial that it had no legal obligation to exercise its second five-year option to extend the site lease and that it could lawfully nonrenew Samaan's franchise. Contrary to Union's position, under PMPA a petroleum franchisor may elect not to renew an existing site lease, but only if it fully complies with all applicable procedural and notification requirements. 15 U.S.C. §§ 2801 et seq.[4]

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[4] The evidence at trial established that Union failed to comply with numerous provisions of PMPA, including, inter alia, the requirement that Union must have notified Petitioner of its nonrenewal decision "not more than 120 days" after it "first acquired actual or constructive knowledge" of the event justifying nonrenewal (15 U.S.C. § 2802(b)(2) (C)(I)); Union's written notice of nonrenewal must have stated the actual "reasons" for its nonrenewal decision (15 U.S.C. § 2804(c)); and Petitioner must have been notified in writing prior to the commencement of the term of [his] then-existing franchise" that "the underlying lease might expire and might not be renewed . . . at the end of such term,"

Following a three week jury trial, the Los Angeles Superior Court, after tentatively indicating its intent to submit the case to the jury (R.T. 1001), directed a verdict in favor of the Niakans and Union as to each claim other than Petitioner's eighth cause of action against Union for misrepresentation, based upon the Superior Court's belief that Petitioner's various state law claims were preempted. At no time did any of the cross-defendants attempt to remove the case to federal court nor was lack of subject matter jurisdiction

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as required by 15 U.S.C. § 2802(c)(4)(B). Even Union's counsel conceded at trial (R.T. 1002) that Union did not comply with at least one essential element of the PMPA notice requirements -- the delivery of a written lease disclosure statement prior to commencement of Samaan's then-existing franchise stating that the site lease might expire as of September 30, 1983, as required by 15 U.S.C. § 2802(c)(4) -- and it is clear that Union also failed to comply with many other necessary PMPA requirements, including failing to offer Samaan a right of first refusal to purchase the service station property.

raised as an issue by the Superior Court or any of the cross-defendants.[5]

Petitioner seeks this Court's review of the Superior Court judgment entered in favor of the Niakans declaring that the service station sublease held by Petitioner had been lawfully terminated and against Petitioner as to his cross-complaint against the Niakans and Union, and the appellate ruling that no subject matter jurisdiction exists to consider Petitioner's appeal. The issue of lack of subject matter jurisdiction was first raised in Union's appellate brief filed on September 3, 1987, approximately five years after the lawsuit was commenced.

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[5] Petitioner's misrepresentation claim was submitted to the jury as to the issue of Union's actual fraud, but the Superior Court refused to give Petitioner's requested jury instructions on negligent misrepresentation. The jury returned a split verdict in favor of Union.

SUBSTANTIALITY OF FEDERAL QUESTIONS

I. THE ISSUE OF CONCURRENT JURISDICTION

The California Court of Appeal dismissed Petitioner's entire appeal based on its perceived belief that Congress impliedly intended to create exclusive federal jurisdiction over PMPA claims, relying upon Rustom v. Atlantic Richfield Co., 618 F. Supp. 210 (C.D. Cal. 1985), and the unpublished decision in Elimelekh v. Texaco, Inc., Bus. Fran. Guide (CCH), ¶ 8663 (C.D. Cal. 1986).[6]

As discussed herein, the appellate court's decision to follow Rustom is inconsistent not only with the express language

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[6] The plaintiff in Rustom was incarcerated when the court hearing was held and his lawyers were not being paid. Rustom's counsel consequently had little incentive to diligently oppose Atlantic Richfield's motion and no incentive to prosecute an appeal. (See Appellant's Reply Brief at 4). In Elimelekh, the district court simply followed Rustom and did not discuss any of the contrary authorities. The Elimelekh decision noted that no opposition was filed by Elimelekh to Texaco's moving papers. The weight that should be accorded to Rustom and Elimelekh is thus highly suspect.

of the statute but also with all other published federal and state case precedents. Until Rustom, it appears to have been accepted by all federal and state courts that concurrent state court jurisdiction existed to adjudicate PMPA claims.[7]

The strong general presumption of concurrent federal and state court jurisdiction to enforce federal statutory rights can be rebutted only "by an explicit statu-

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[7] The Rustom court reexamined the existing case law and decided that Congress intended to give federal courts exclusive jurisdiction over PMPA based upon a reference in the Senate and House Reports which refers to the maintenance of an action by an aggrieved dealer in federal court: "'The provisions of Title I are enforceable by private civil action in U.S. District Court.' S. Rep. No. 95-731, 95th Cong., 2d Sess. 16, reprinted in 1978 U.S. Code Cong. & Ad. News 873, 874; H.R. Rep. No. 95-161, 95th Cong. 1st Sess. 14." 618 F. Supp. at 212. The district court also noted what it believed was a "conspicuous absence" of any reference to filing a PMPA lawsuit in state court. Id. Further, Rustom relied upon PMPA's incorporation of standards under the Federal Rules of Civil Procedure for the award of damages and for issuance of preliminary injunctions to find an "unmistakable implication" that exclusive federal court jurisdiction was intended.

tory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981). Thus, "the presumption is that jurisdiction is concurrent, and some strong showing of need for exclusive jurisdiction is required to overcome that presumption." Redish & Muench, Adjudication of Federal Causes of Action in State Court, 75 Mich. L. Rev. 311, 325n.63 (1976). The presumption of concurrent jurisdiction is controlling absent specific provision by Congress to the contrary or disabling incompatibility between the federal claims and state court adjudication. Gulf Offshore Co., 453 U.S. at 791.

The strong presumption of concurrent jurisdiction over federal statutes is buttressed by the language of PMPA, its recognized remedial purpose, the great weight of case authority, and Congress' long acquies-

cence in the holding of Ted's Tire Service, Inc. v. Chevron USA, Inc., 470 F. Supp. 163 (D. Conn. 1979) -- one of the first cases decided under PMPA -- which concluded that state courts enjoy concurrent jurisdiction.

The statutory language of PMPA strongly suggests that concurrent jurisdiction was intended. The operative section of PMPA, 15 U.S.C. § 2805(a), provides that a PMPA claim "may be brought" in federal court.[8] Use of the discretionary word "may" strongly suggests that Congress intended to create concurrent jurisdiction. Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Lane v. Central Bank of Alabama, 756 F.2d 814 (11th Cir. 1985); Berg v. Watson, 417 F. Supp. 806, 808n.1 (S.D.N.Y.

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[8] Section 2805(a) reads:

> "If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor."

1976). The language of PMPA does not contain any restriction as to the forum in which the franchisee's civil action may be pursued.

Other sections of PMPA likewise suggest Congress' intent to permit state court enforcement of the Act. The preemption language of the Act, § 2806(a), only precludes state enforcement of state law which differs from the provisions of the PMPA. If a state's "provision of . . . law or regulation is the same as the applicable provision of the [PMPA]" it is not preempted, and state enforcement of any such law may continue. If states may enforce state laws identical to the PMPA, obviously Congress did not intend to preclude states from enforcing PMPA itself.

Similarly, § 2804(b)(2)(B), setting forth additional notification requirements for a franchisor which intends to discontinue retail business in a geographic area, requires the franchisor to give notice "to

the Governor of each state which contains a portion of such area." Why alert state governments if no state enforcement role is contemplated?

PMPA was enacted by Congress in 1978 to protect petroleum franchisees, such as Petitioner, from unfair conduct on the part of a franchisor in disregard of the franchisee's rights:

> It is also important to note that often the reasonable expectations of the parties to a motor fuel franchise are that the relationship will be a continuing one. This expectation by the franchisee, in particular, is often the result of and fostered by, statements and actions of the franchisor. As a result, nonrenewal of a motor fuel franchise relationship at the expiration of its term can be almost as punitive as termination of the franchise during its terms. The reasonable expectations of the franchisee, rather than any definitive contract rights, are destroyed.

* * * * *

> An essential requirement of federal legislation is that the grounds for termination and nonrenewal provided by the legislation not be so broad as to deny franchisees meaningful protection from arbitrary or discriminatory terminations and nonrenewals or prevent fulfillment of the reasonable renewal expectations of franchisees.

Senate Report No. 95-731, at 18 (emphasis added).[9]

It has been consistently recognized that PMPA was intended to effectuate a strong remedial purpose and is entitled to

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[9] PMPA permits an aggrieved franchisee to recover compensatory damages, injunctive relief, and attorneys' fees. 15 U.S.C. § 2805. Punitive damages may also be recovered if the franchisor acted "in willful disregard" of its renewal obligations under 15 U.S.C. § 2802. 15 U.S.C. § 2805(d)(1)(B). Under PMPA, the franchisor "shall bear the burden of going forward with evidence to establish as an affirmative defense" that the franchisor's conduct in nonrenewing the franchise was in full compliance with all PMPA requirements. 15 U.S.C. § 2805(c).

a liberal construction consistent with its underlying purpose:

> Congress enacted the Petroleum Marketing Practices Act to protect 'franchisees from arbitrary or discriminatory termination or non-renewal of their franchisees.' S. Rep. No. 95-731, 95th Cong. 2d Sess. 15, reprinted in 1978 U.S.Code Cong. & Ad. News 873, 874 [hereinafter cited as Senate Report]. We have recognized that '[a]s remedial legislation, the Act must be given a liberal construction consistent with its goal of protecting franchisees.' Humboldt Oil Co. v. Exxon Co., U.S.A., 695 F.2d 386, (9th Cir. 1982) (Citation omitted.)

Khorenian v. Union Oil Co. of California, 761 F.2d 533, 535 (9th Cir. 1985) (emphasis added).

Accord, Brach v. Amoco Oil Co., 677 F.2d 1213, 1220-21 (7th Cir. 1982) ("Our duty is to give PMPA the most harmonious, comprehensive meaning possible. As remedial leg-

islation, the Act must be given a liberal construction consistent with its overriding purpose to protect franchisees." (Emphasis added.) (Citations omitted.)

A finding of "[e]xclusivity would obviously create an obstacle in the way of a private litigant, who would be compelled to bring his claim in federal court even if he preferred a state forum. Such a result does not seem in accordance with Congress' intentions as we perceive them." Cianci v. Superior Court, 40 Cal. 3d 903, 912, 710 P.2d 375, 221 Cal. Rptr. 575 (1985) (finding concurrent RICO jurisdiction).

In Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), the Supreme Court was asked to decide whether the Labor Management Relations Act of 1947 bestowed exclusive jurisdiction on federal courts. Section 301(a) of the act provides that "[s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States

. . . without respect to the amount in controversy . . . ." The Court found that this language "simply gives the Federal District Court jurisdiction over suits for violation of certain specified types of contracts" and that it "does not state or even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described 'may' be brought in the federal district courts, not that they must be." Dowd, 368 U.S. at 506 (emphasis added). The Supreme Court further noted that our concept of a federal system of government does not prevent state courts from enforcing rights created by federal law.

In Ted's Tire Service, Inc. v. Chevron USA, Inc., 470 F. Supp. 163 (D. Conn. 1979), one of the earliest cases decided under PMPA following its enactment in 1978, it was unambiguously held that § 2805(a) creates a discretionary right for service

station dealers to proceed with PMPA claims in either a state or federal forum:

> [PMPA] stipulates that a civil action to redress a violation of the statute 'may be brought' in a federal district court; it does not state that such an action must be instituted in federal court. 15 U.S.C. § 2805 (emphasis added. It has been long established that, absent any indication that the federal courts have exclusive jurisdiction over a particular subject, federal laws may be enforced in either the state or federal courts.

470 F. Supp. at 165 (second emphasis added).

The federal court in Ted's Tire concluded:

> [T]here is nothing in the PMPA which suggests that the Connecticut Superior Court would not have had jurisdiction over a complaint brought under the PMPA.

Id.

Ted's Tire has become sufficiently established as a correct statement of the blackletter rule of law that it is cited with approval by Professors Wright, Miller, and Cooper for the proposition that "[u]nless Congress expressly makes federal court jurisdiction exclusive, federal and state courts have concurrent jurisdiction to try federal claims." 13 Wright, Miller & Cooper, Federal Practice and Procedure, § 3527, 245 & 246n.23.

At no time has Congress attempted to amend PMPA to overturn the holding of Ted's Tire that concurrent state court jurisdiction exists to adjudicate PMPA claims. Congress' prolonged acquiescence in the result reached in Ted's Tire strongly suggests that concurrent jurisdiction is in fact precisely what had been congressionally intended.

The California Court of Appeal's blind adherence to Rustom ignores Congress' long-standing acceptance of Ted's Tire and

places undue weight on the fact that PMPA "is federal legislation applying federal remedies which have been extensively interpreted by federal courts." Niakan, 245 Cal. Rptr. at 27. However, "[n]othing in the concept of our federal system prevents state courts from enforcing rights created by federal law." Johnson v. Mobil Oil Co., 364 Pa. Super. 275, 528 A.2d 155, 164 (1987). It is established that "[s]tate courts have the power, indeed the duty, to pass on questions of federal law that arise in cases properly brought in their courts." Waldron v. McAtee, 723 F.2d 1348, 1352 (7th Cir. 1983) (emphasis added). Accord, Testa v. Katt, 330 U.S. 386, 393 (1947) ("For the policy of the federal Act is the prevailing policy in every state."); see Worldwide Church of God v. McNair, 805 F.2d 888, 891 (9th Cir. 1986) ("[A]ny other rule would result in a waste of judicial resources and unnecessary friction between state and federal courts.")

Highly relevant is Brown v. Pitchess, 13 Cal. 3d 518, 531 P.2d 772, 199 Cal. Rptr. 204 (1975), a leading textbook decision on the issue of concurrent state and federal jurisdiction over claims arising under federal law. In Brown, the California Supreme Court held that state courts have jurisdiction over federal civil rights suits brought under 42 U.S.C. § 1983 despite the fact that the vast bulk of lawsuits brought under that statute were historically filed in federal court.

Although 28 U.S.C. § 1343(3), the jurisdictional section governing § 1983 claims, confers "original jurisdiction" on the federal courts, Brown concluded that "original jurisdiction" "does not mean exclusive jurisdiction." 13 Cal. 3d at 521. "Unless Congress confers exclusive jurisdiction on federal courts, state courts competent to exercise it have concurrent jurisdiction to enforce federal law in civil actions." Id. (Emphasis added.)

The California Supreme Court further observed:

> When intending to confer exclusive, as well as original, jurisdiction on the federal district courts, Congress is quite capable of making itself understood. For example, section 1338(a) of title 28 of the United States Code provides: 'The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety production and copyright cases.'

Id. (emphasis in original).

In Cianci v. Superior Court, 40 Cal. 3d 903, 911-13, 710 P.2d 375, 221 Cal. Rptr. 575 (1985) (holding that concurrent jurisdiction exists over RICO claims), the California Supreme Court expressly cited PMPA as an example of a federal statute

which provides for concurrent jurisdiction. 40 Cal. 3d at 913. Like PMPA, the relevant provision of RICO, 18 U.S.C. § 1964(c), provides that any aggrieved person "may" file a lawsuit in federal district court.[10] The Cianci holding was recently adopted by the Ninth Circuit in Lou v. Belzberg, 834 F.2d 730 (9th Cir. 1987).

Other federal decisions also recognize that state courts have concurrent PMPA jurisdiction. In Abadjian v. Gulf Oil Corp., 602 F. Supp. 874 (C.D. Cal. 1983), for example, the federal district court remanded the case to the Los Angeles Superior Court

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[10] The California Court of Appeal also recognized that concurrent state court jurisdiction exists over PMPA claims in California Arco Distributors, Inc. v. Atlantic Richfield Co., 158 Cal. App. 3d 349, 364, 204 Cal. Rptr. 743 (1984): "[W]e are cognizant that the state courts have concurrent jurisdiction to enforce the PMPA." Based upon Cianci and CADI, it had been the established law in California at all relevant times that state courts have concurrent jurisdiction over PMPA actions. Both Cianci and California Arco Distributors expressly relied upon the authority of Ted's Tire Service, Inc. v. Chevron USA, Inc., 470 F. Supp. 163 (D. Conn. 1979).

after it had been removed by the defendants. In Abadjian, as in this case, the plaintiffs alleged that their franchisor had conspired with a third party to defeat the service station dealers' PMPA rights. Because the third party was not a "franchisor" as defined by PMPA, no independent basis for federal jurisdiction was present as to all necessary parties. The district court's remand of the case to state court clearly demonstrates the federal court's belief that concurrent PMPA jurisdiction exists.

In Lanham v. Amoco Oil Co., 481 F. Supp. 405 (D. Md. 1979), the court accepted jurisdiction over an action under PMPA that was removed from state court. Because "a federal district court acquire[d] no removal jurisdiction over a claim that the state court initially lacks subject matter jurisdiction to decide" under the then-existing removal rules, this decision necessarily

recognizes that the state courts have concurrent PMPA jurisdiction.

More recently, the existence of state court jurisdiction over PMPA claims was noted in Sun Refining & Marketing Co. v. D'Arpino, 112 F.R.D. 668, 670 (S.D.N.Y. 1986), in which the district court granted a petroleum franchisor's motion to remand an action to state court:

> [A]ny arguments that D'Arpino wishes to raise with respect to the PMPA will have to be made in the Village Court of Ossining, where the court may exercise concurrent jurisdiction over the PMPA.

Until Niakan, Rustom was the only published decision since the enactment of PMPA in 1978 to hold that federal courts have exclusive jurisdiction over PMPA claims. Rustom had never been followed or cited with approval in any reported federal or state decision until the decision below.

This Honorable Court's attention is particularly directed to the recent case of Johnson v. Mobil Oil Co., 364 Pa. Super. 275, 528 A.2d 155 (1987), which contains a cogently articulated rejection of Rustom and its logic. The Pennsylvania court traced the history of the concurrent jurisdiction to Alexander Hamilton's The Federalist No. 82 before addressing the relative merits of the Rustom and Ted's Tire decisions. Applying long established jurisdictional precepts, the Pennsylvania court concluded:

> We see no reason for precluding a state court from adjudicating a contractual claim arising under the PMPA, especially where, as here, we deal with a clear dictate of federal law. As noted above, the presumption of concurrent jurisdiction can be rebutted by explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests. The

> PMPA does not expressly limit jurisdiction to federal courts, and we find no clear indication of exclusive jurisdiction in the legislative history. Finally, we perceive no incompatibility between state-court jurisdiction and promoting Congress' intent to protect the needs of both franchisees and franchisors, to remedy disparity in bargaining power and to prevent arbitrary or disciplinary termination or nonrenewal. For the foregoing reasons, we find that a state court enjoys concurrent jurisdiction over claims brought under the PMPA. See Ricco v. Shell Oil Co., 180 N.J. Super. 399, 434 A.2d 1151 (1981); Munno v. Amoco Oil Co., 488 F.Supp. 1114 (D.C. Conn. 1980).

528 A.2d at 164.

In addition to Johnson, every other published state court PMPA opinion has found or assumed concurrent jurisdiction, including Adams v. Iowa Oil Co., Bus. Fran. Guide (CCH), ¶ 8008 (Iowa S. Ct. 1983); Frankard v. Amoco Oil Co., 116 Wis. 2d 254,

342 N.W.2d 247 (1983); Davis v. Gulf Oil Corp., 485 A.2d 160 (D.C. App. 1984); ARCO Petroleum Products Co. v. Williams, 146 Ill. App. 3d 218, 496 N.E.2d 1098 (1986); ERA Enterprises, Inc. v. Gulf Oil Corp., 506 So. 2d 160 (La. App. 1987); Thomas v. Amoco Oil Co., 455 So. 2d 1187 (La. App. (1984); Walters v. Chevron USA, Inc., 154 Ga. App. 636, 269 S.E.2d 495 (1980); Bates v. Chevron USA, Inc., 151 Ga. App. 544, 260 S.E.2d 367 (1979); Consumers Petroleum of Connecticut, Inc. v. Duhan, 38 Conn. Super. 495, 452 A.2d 123 (1982); Ricco v. Shell Oil Co., 180 N.J. Super. 399, 434 A.2d 1151 (1981); and DaCosta's Automotive Inc. v. Birchwood Plaza Shell, Inc., 106 A.D.2d 484, 482 N.Y.S.2d 832 (1984). The precedents supporting the existence of state court jurisdiction are overwhelming.

As courts of general jurisdiction, state courts regularly apply principles of federal law to disputes that raise federal questions. See, e.g., Dice v. Akron, Can-

ton & Youngstown Ry. Co., 342 U.S. 359, 361-63 (1952) (Ohio courts must follow FELA requirement that all factual issues be tried by a jury, despite "local rule of procedure" to the contrary.)

Rustom is neither historically well-founded nor convincing in its review of the legislative history of PMPA. Its effect of depriving the state courts of jurisdiction over a large class of cases arising under a heavily litigated statute is disquieting and runs directly contrary to the proclaimed congressional intent of providing petroleum franchisees with additional protection against abusive franchise practices.

In light of Rustom and Niakan, it is highly unlikely that any petroleum franchisee will risk bringing future PMPA claims in state court, thereby effectively forcing all new PMPA claims to be automatically filed in the already overburdened federal courts. Unless future litigants elect to

risk filing their PMPA claims in state court, this petition may well be this Court's only opportunity to resolve the PMPA jurisdictional issue.

II. FEDERAL QUESTIONS MAY BE RAISED COLLATERALLY AS A MATTER OF DEFENSE.

Even assuming, arguendo, that the California state courts lack subject matter jurisdiction, dispositive of Petitioner's right to have his PMPA claims adjudicated before the California Court of Appeal is the established rule that state courts must consider and resolve all federal questions raised as a matter of defense, even where jurisdiction in the federal courts would normally be exclusive.

Where Congress has granted exclusive jurisdiction to the federal courts, such as with regard to violations of the Securities Exchange Act, state courts can and indeed must resolve such claims where they are raised as a matter of defense. Aetna State Bank v. Altheimer, 430 F.2d 750, 754 (7th

Cir. 1970) (federal supremacy clause requires state court adjudication of exclusive federal questions raised defensively); Weiner v. Shearson, Hammill & Co., Inc., 521 F.2d 817, 822 (9th Cir. 1975) (state court has jurisdiction to rule on federal securities law issues raised by affirmative defense). As the United States Supreme Court held in Hathorn v. Lovorn, 457 U.S. 255, 266 (1982): "[E]ven a finding of exclusive federal jurisdiction over claims arising under a federal statute usually 'will not prevent a state court from deciding a federal question collaterally,'" quoting Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483n.12 (1981).

Petitioner was involuntarily named as a defendant in this litigation and had no opportunity to select the forum. It is highly unfair, and flatly inconsistent with established case law, to deprive Petitioner of his right to raise all pertinent legal defenses, including compulsory cross-com-

plaints created by federal law, in response to an action instituted by another in a state forum. In adjudicating the Niakans' claims, the California state courts were clearly required to address the merits of Petitioner's arguments concerning his right to renewal under PMPA.[11]

In the case at bar, the California Court of Appeal failed to carry out its constitutional obligation to consider and resolve the federal defenses and claims raised by Petitioner.

III. PETITIONER'S STATE LAW CLAIMS ARE NOT PREEMPTED BY PMPA.

The question of preemption is perhaps the most significant and frequently liti-

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[11] Indeed, it would have been impossible for Petitioner to adequately protect his tenancy rights in a federal forum since the Niakans were proceeding against Petitioner in the state court action and no independent basis for federal jurisdiction existed to bring the Niakans into federal court as they were not "petroleum franchisors" as defined in PMPA. See Abadjian v. Gulf Oil Corp., 602 F. Supp. 874 (C.D. Cal. 1983).

gated legal issue raised in petroleum franchisor-franchisee litigation under PMPA. It is respectfully submitted that the preemptive effect of PMPA is an issue of substantial public importance, not only with regard to future PMPA litigation but also for a whole array of statutory schemes involving concurrent federal and state regulation.

What is highly unusual about Niakan -- and of tremendous public policy importance -- is the notion that PMPA, a remedial federal statute, somehow deprives the state courts of the right to provide redress to injured litigants for breaches of contract, fraud, unfair business practices, violations of state franchise laws, and a host of other statutory and common law protections which Congress could not conceivably have intended to eliminate when in enacted PMPA in 1978.

The two leading federal decisions on the preemption issue -- Bellmore v. Mobil

Oil Corp., 783 F.2d 300 (2d Cir. 986), and Lippo v. Mobil Oil Corp., 776 F.2d 706 (7th Cir. 1985) -- both fully support Petitioner's position.

In Bellmore, the Second Circuit, after thoroughly reviewing the legislative history of PMPA and the existing case law, concluded that PMPA

"preempts only state statutes as to grounds for, procedures for and notification requirements with respect to termination or nonrenewal." Id. at 304. Thus, Congress sought in § 2806 to preempt the hodgepodge of then existing state "good cause" statutes (see, e.g., Cal. Bus. & Prof. Code § 20999.1) which had been enacted to protect franchisees against wrongful termination. State common law principles and statutes relating to other nonrenewal and termination issues are not preempted by PMPA. Bellmore, supra, at 304.

The Second Circuit specifically rejected Mobil's argument that PMPA broadly pre-

empts "any issue related to the termination or nonrenewal of petroleum franchises," responding: "We disagree. The PMPA neither expressly or impliedly preempts all state law relating to any aspect of the termination or nonrenewal of petroleum franchises." Id. The court further noted that it would be contrary to the intended Congressional purpose "to read the statute expansively" so as to interfere with the right of a state to provide legal redress for wrongdoing "in areas that Congress left to the control of the states." Id. at 305.

In Lippo v. Mobil Oil Corp., 776 F.2d 706 (7th Cir. 1985), the court upheld a summary judgment awarding damages, permanent injunctive relief, and attorneys' fees to a franchisee terminated for selling non-Mobil gasoline. The court noted that under 15 U.S.C. § 2802(b)(2)(C), a franchisor can terminate an existing franchise based upon the "occurrence of an event which is relevant to the franchise relationship and as a

result of which termination of the franchise . . . is reasonable" and that § 2802(c)(10) specifically defines "misbranding of motor fuels" as a reasonable basis for termination. 776 F.2d at 720. However, notwithstanding the express language of § 2802(c)(10), the parties' written franchise agreement gave the franchisee a ten-day contractual right to cure any default. Id.

Affirming the district court's judgment in favor of the franchisee, the Seventh Circuit rejected Mobil's contention that the franchisee should not have been granted an award of attorneys' fees under PMPA since "Mobil could have terminated the franchise under the PMPA but for [the contractual provisions of] the Retail Dealer Contract" id., specifically ruling that a franchisor's termination decision that fails to comply with the terms of a petroleum franchise contract cannot be considered to be "in good faith":

> While Mobil could have terminated but for the contract provision, we believe Lippo prevailed both on his contract claim and on his PMPA claim. The PMPA is remedial legislation that 'must be given a liberal construction consistent with its overriding purpose to protect franchisees.' In an action brought under section 2805(a) the franchisee has the burden of proving termination of the franchise. (This must really mean attempted termination if the injunctive relief is to be of any use.) The franchisor then bears the burden of going forward with evidence to establish as an affirmative defense that the termination is permitted under section 2802(b). 15 U.S.C. § 2805(c).

Id. (citations omitted).

The Seventh Circuit explained its decision as follows:

> Mobil claimed termination was proper under sections 2802(b)(2)(A) and 2802(b)(2)(C). As noted above, section 2802(b)(1)(C) provides for termination for an event relevant to the

franchise relationship, of which the sale of misbranded gasoline is an example. But termination is allowed only if it 'is reasonable.' Mobil asks us to hold, in essence, that termination in violation of the franchise contract could be reasonable. We do not believe that a termination can be reasonable, even if based on an event for which termination would otherwise be reasonable, when the contract gives the franchisee a chance to correct that default.

A similar line of reasoning applies to the attempt to base the termination on section 2802(b)(2)(A), which allows, under certain conditions regarding knowledge not relevant here, termination for a failure by the franchisee to comply with a provision of the franchise when the provision is reasonable and of material significance to the franchise relationship. Even if sale of non-franchisor gasoline as gasoline of the franchisor would normally be a failure to comply with a reasonable and materially significant

> provision, here Mobil gave Lippo the right to correct such a failure. We do not believe that a franchisor can give such a right of correction in its contract and then turn around and try to terminate under the PMPA without reference to that right of correction. A termination cannot be for failure to comply with a reasonable and materially significant provision of a contract when it is in violation of that contract.

Id. at 721 (emphasis added).[12]

Niakan does not discuss or even refer to Bellmore or Lippo despite the fact that they are clearly the most authoritative federal cases on this subject.

Similarly, in Johnson v. Mobil Oil Corp., 364 Pa. Super. 275, 528 A.2d 155 (1987), a case which involves facts remark-

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[12] Accord, DiNapoli v. Exxon Corp., Bus. Fran. Guide (CCH), ¶ 7818 (D.N.J. 1982) (franchisor must comply with both PMPA and all contractual provisions between itself and its dealer regarding termination or nonrenewal) (upholding award of summary judgment in favor of plaintiff/franchisee.)

ably similar to the case at bar, the court ruled that the nonrenewal franchisee's state law claims were not preempted by PMPA:

> We find that state law is preempted by the PMPA only to the extent that it is inconsistent with the PMPA. Appellant's claims of fraud and misrepresentation are neither covered by nor inconsistent with the PMPA.

528 A.2d at 162 (emphasis added).

As observed in Bellmore, PMPA was intended to provide additional protection to petroleum franchisees against arbitrary or unfair termination or nonrenewal, not to sweep away existing common law protections. "The purpose of Title I of H.R. 130 is the establishment of minimum federal standards governing the termination and nonrenewal of franchise relationships." Senate Report No. 95-731, supra, at 15.

Nothing in PMPA even remotely suggests that PMPA was intended by Congress to

create a license for petroleum companies to abrogate binding contractual obligations that provide franchisees with protection beyond that mandated by federal law or that Congress meant to give petroleum franchisors carte blanche to commit acts of fraud, acts of unfair competition, state franchise law violations, or other violations of state law.[13]

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[13] Bellmore is far from the only case to conclude that state law remedies are not preempted by PMPA. Other decisions reaching the same result include: Esso Standard Oil Co. v. Department of Consumer Affairs, 793 F.2d 431 (1st Cir. 1986) (Puerto Rico service station rent regulation statute not preempted by PMPA); Pro Sales, Inc. v. Texaco, Inc., 792 F.2d 1394, 1399n.7 (9th Cir. 1986) (Oregon contract law not preempted by PMPA); Barnes v. Gulf Oil Corp., 795 F.2d 358, 362-64 (4th Cir. 1986) (state law concerning validity of assignment of franchise not preempted by PMPA); L.C. Williams Oil Co., Inc. v. Exxon Corp., 627 F. Supp. 864, 867-68 (M.D.N.C. 1985) (state unfair trade practices statute and implied covenant of good faith claims not preempted by PMPA); Cason v. Texaco, Inc., 621 F. Supp. 1518, 1524 (M.D. La. 1985) (state unfair trade practices claim not preempted by PMPA); Hanes v. Mid-American Petroleum, Inc., 577 F. Supp. 637, 645 (W.D. Mo. 1983) ("reference to State law to determine whether an oral agreement existed between the parties would not conflict with the policies underlying the PMPA); DiNapoli v.

The contractual provisions of Petitioner's franchise agreements provide Petitioner with even greater protection against

Exxon Corp., Bus. Fran. Guide (CCH), ¶ 7818 (D.N.J. 1982) (contractual agreement between oil company and dealer "creates a condition precedent to Exxon's right to terminate the franchise under the PMPA"; failure to give contractually required notice prior to termination warrants summary judgment in favor of franchisee); Lasko v. Consumers Petroleum of Connecticut, Inc., 547 F. Supp. 211, 217-18 (1981) (Connecticut franchise law not preempted); Lyons v. Mobil Oil Corp., 526 F. Supp. 961, 965 (D. Conn. 1981) ("The PMPA does not prevent the parties from entering into a contract."); Ted's Tire Service, Inc. v. Chevron U.S.A., Inc., 470 F. Supp. 163, 165 (D. Conn. 1979) (PMPA "does not preempt all state laws regulating petroleum franchises."). See also Senate Report No. 95-731 at 18 ("the relationship of the parties to a motor fuel franchise agreement is basically contractual in nature") (emphasis added); Jiminez v. B.P. Oil, Inc., 652 F. Supp. 329, 334-35 (D. Md. 1987) (Maryland nonrenewal statute not preempted); Exxon Corp. v. Georgia Ass'n of Petroleum Retailers, 484 F. Supp. 1008, 1018 (N.D. Ga. 1979) aff'd, 644 F.2d 1030 (5th Cir.), cert. denied, 454 U.S. 932 (1981) (state law controlling "the terms of a franchise" not preempted although statute could have some "attenuated application to a lawsuit over termination or nonrenewal"); Ricco v. Shell Oil Co., 180 N.J. Super. 399, 434 A.2d 1151, 1155 (1981) (dealer's fraud claims based upon nonrenewal of franchise remanded for trial).

nonrenewal that provided by PMPA, since loss of Union's underlying site lease was not specified as a ground for nonrenewal in Petitioner's franchise contract. (Trial Ex. 3; R.T. 316-18; 347; 349-54, 478-82, 735).

IV. WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE DIRECTED VERDICTS AGAINST THIS PETITIONER.

By virtue of the trial court's directed verdicts based on PMPA and preemption of Petitioner's state law claims and the California Court of Appeal's finding of lack of jurisdiction, Petitioner has been deprived of the opportunity to present his claims to a jury (other than his misrepresentation claim as to which the Superior Court erroneously refused to give his requested jury instructions on negligent misrepresentation).

As discussed in detail in Petitioner's appellate briefs filed below, PMPA limits both the grounds upon which and the manner

in which a franchisor may fail to renew a petroleum franchise by imposing strict procedural and substantive restrictions on the termination or failure to renew a motor fuel distribution franchise. "The PMPA prohibits the termination or nonrenewal of a franchise except for specifically enumerated reasons and upon the franchisor's compliance with the Act's notice requirements." Khorenian v. Union Oil Co. of California Inc., 751 F.2d 533, 535 (9th Cir. 1985) (emphasis added). The primary purpose of the act is to prevent petroleum franchisors from dealing unfairly or arbitrarily with their franchisees. Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc., 711 F.2d 138, 139 (9th Cir. 1983); Blankenship v. Atlantic Richfield Co., 478 F. Supp. 1016 (D. Or. 1979).

Once nonrenewal of a service station franchise has occurred, it is the franchisor's burden of proof to show that its failure to renew falls within one of the statu-

torily recognized justifications. Khorenian, supra, 761 F.2d at 535. In this regard, 15 U.S.C. § 2805(c) provides that:

> The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under Section 2802(b) or 2803 of this title, and if applicable that such franchisor complied with the requirements of Section 2802(d) of this title.

Whether a franchisor has "good cause" to terminate or nonrenew an existing franchise is a question of fact which must be determined on the merits. Ernst Enterprises, Inc. v. Sun Valley Gasoline, Inc., 139 Cal. App. 3d 355, 358-59, 188 Cal. Rptr. 641 (1983); Roberts v. Amoco Oil Co., 740 F.2d 602, 605-07 (8th Cir. 1984); see, e.g., Lyons v. Mobil Oil Corp., 526 F. Supp. 961 (D. Conn. 1981), and Lyons v. Mobil Oil Corp., 554 F. Supp. 199 (D. Conn. 1982) (franchisor's settlement of preexist-

ing lawsuit concerning possession of service station premises is not an "event" that is "relevant" to the franchise relationship and cannot serve as a proper basis for termination of franchise under 15 U.S.C. § 2802(c).)

With regard to the instant litigation, PMPA permitted Union not to renew Petitioner's franchise based upon the loss of its underlying site lease if and only if Union proved at trial that each of the following six elements was met:

1. That Samaan was notified in writing by Union prior to "the commencement of the term of [his] then existing franchise" that "the underlying lease might expire and might not be renewed . . . at the end of such term (in the case of nonrenewal)" (15 U.S.C. § 2802(c)(4)(B));

2. That Union's decision not to renew the site lease was made "in good faith and in normal course of business" (15 U.S.C. § 2802(b)(3)(D));

3. That Union notified Samaan of its nonrenewal decision "not more than 120 days" after it "first acquired actual or constructive knowledge" of the event justifying nonrenewal (15 U.S.C. § 2802(b)(2)(C)(I));

4. That the event which let Union to nonrenew Samaan's franchise occurred "during the period the franchise was in effect," (15 U.S.C. § 2802(b)(2)(C));

5. That Union's notice of nonrenewal informed Samaan "in writing" of the actual "reasons" for its nonrenewal of the franchise (15 U.S.C. § 2804(c)); and

6. That Union "made a bona fide offer to sell, transfer, or assign to the franchisee [its] interests in [the service station] premises" within "the 90-day period" following Samaan's receipt of the notice of nonrenewal (15 U.S.C. § 2802(b)(3)(D)(iii)).

The uncontroverted evidence at trial clearly demonstrated that Union's nonre-

newal of Petitioner's service station franchise did not comply with the applicable PMPA requirements and was invalid as a matter of law. A detailed recitation of the respondents' violations of PMPA is set forth at pages 19-39 of Appellant's Opening Brief filed with the California Court of Appeal.

Respondents' legal contention throughout this lawsuit that a petroleum franchisor has no obligation under PMPA to exercise an option to extend an underlying site lease is an incomplete and inaccurate statement of the applicable law. While a petroleum franchisor may elect not to renew an existing site lease, the petroleum franchisor can do so only if it fully complies with all applicable procedural and notification requirements of PMPA. Absent strict compliance with such mandatory requirements, a petroleum franchisor is guilty of a per se violation of PMPA and the dealer is entitled to "renewal for another three

year term." Blankenship v. Atlantic Richfield Co., 478 F. Supp. 1016, 1019 (D. Or. 1979). Union cites no authority, and indeed there is none, permitting an oil company to nonrenew a service station dealer based upon loss of an underlying lease, notwithstanding the petroleum franchisor's failure to affirmatively show its proper compliance with all applicable PMPA notice and procedural requirements.

Similarly, it was shown at trial that Samaan was contractually entitled to even greater protection against nonrenewal since, unlike PMPA, loss of Union's site lease is not specified as a ground for nonrenewal in Samaan's franchise contract. (Trial Ex. 3; R.T. 316-18; 347-54; 478-82; 735).

In addition, substantial evidence was presented before the Superior Court that Union negligently misrepresented to Samaan the duration of his franchise rights at the Wilshire service station (R.T. 45-65, 305,

309, 312-313, 399-400, 571-572) and committed other unfair business practices for which relief should be awarded. See Hartman v. Shell Oil Co., 68 Cal. App. 3d 240, 248, 137 Cal. Rptr. 244 (1977); Wojciechowski v. Amoco Oil Co., 483 F. Supp. 109, 114-15 (E.D. Wis. 1980) (franchisor's "acts of fraud" preclude termination); Johnson v. Mobil Oil Corp., 364 Pa. Super. 275, 528 A.2d 155 (1987).

CONCLUSION

This Court should grant its Writ of Certiorari to review the decision in this case in order to finally resolve the important federal questions of jurisdiction and preemption under PMPA, issues as to which the various state courts and lower federal courts have continually reached diametrically opposing results. The case at bar presents this Court with a unique opportu

nity to resolve both of these critical issues upon a completed record.

Respectfully submitted,

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JOHN C. GORMAN

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ISSA ELIAS SAMAAN

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APPENDIX A

F. NIAKAN, E. Niakan, Ben Niakan, Bob Niakan and Betty Niakan, Plaintiffs and Respondents

v.

Issa Elias SAMAAN, Defendant and Appellant.

Union Oil Company of California, Defendant and Respondent.

Civ. No. B015459.

Court of Appeal, Second District, Division 5

February 16, 1988.

Owners of property sued gasoline franchisee seeking declaration that franchisee had no right to remain on premises beyond expiration of sublease with gasoline franchisor. Franchisee cross-complained alleging violations of federal Petroleum Marketing Practices Act. The Superior Court, Los Angeles County, Jacqueline L. Weiss, J., entered judgment against franchisee on his cross claims, and appeal followed. The Court of Appeal, Hastings, J., retired, assigned, held that state court did not

have jurisdiction of franchisee's claims, as such claims under Petroleum Marketing Practices Act were within exclusive jurisdiction of federal courts.

Appeal dismissed.

Courts 489(1)

State court did not have jurisdiction over claims asserted by gasoline franchisee alleging improper termination of franchise, as federal court had exclusive jurisdiction of any action brought under Petroleum Marketing Practices Act. Petroleum Marketing Practices Act, § 101 et seq., 15 U.S.C.A. § 2801 et seq.

Minutillo & Gorman, John C. Gorman, San Jose, Kindel & Anderson, and David Laufer, Woodland Hills, for defendant and appellant.

Margolis, Ryan, Burrill & Besser, Robert S. Besser and Christopher Chapin, Los Angeles, for defendant and respondent Union Oil Co.

Thomas E. Reeks, Los Angeles, for plaintiffs and respondents.

HASTINGS, Associate Justice.*

Defendant/Appellant Issa Elias Samaan (appellant) appeals from the judgment entered against him and in favor of plaintiffs/respondents F. Niakan, E. Niakan, Ben Niakan and Betty Niakan (the Niakans) and Union Oil Company of California (Union Oil); and from denial of his motion for a new trial.

FACTS:

In 1963, Union Oil[1] leased a service station site on Wilshire Boulevard in Los Angeles from the Sheffields and constructed a Union Oil Station facility on the site. The original term of the lease expired on

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* Retired Associate Justice of the Court of Appeal serving as a senior judge by order of the chairperson of the Judicial Council.

[1] Union Oil is a petroleum marketing franchisor, as defined by the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 et seq.

April 30, 1979. The lease contained options to extend the lease for two five-year periods. On September 30, 1980, Union Oil exercised one of its two options to extend the site lease. The new expiration date was scheduled for April 30, 1984. The Sheffields subsequently sold the site to the Niakans.

On July 15, 1977, Union entered into a franchise agreement with appellant which encompassed a sub-lease of the same Wilshire Blvd. service station site. The sub-lease was for a three-year period ending July 14, 1980. On September 30, 1980, Union Oil and appellant entered into another three-year franchise which, by its terms, commenced on September 15, 1980 and expired on September 30, 1983. When these franchise lease documents were delivered to appellant for signature, he was given written notice of the April 30, 1984 expiration date of the site lease.

In August 1981, Union Oil entered into a settlement agreement with the Sheffields and Niakans, in order to settle a lawsuit brought by the Sheffields in 1977. The Sheffield suit claimed retroactive rental increases were due under the site lease. Under the terms of the settlement, Union Oil relinquished its option to extend the site lease for an additional five-year term and its tenancy of the site beyond September 30, 1983 (appellant's sub-lease's expiration date).

Appellant did not receive notice of this settlement and learned about it in June, 1982, from the Niakans' attorney. Up to that time, he understood the site lease was due to expire on April 30, 1984. Appellant took the position that the settlement agreement was invalid as to his interest and that he was entitled to remain in possession of the site beyond the expiration date of his lease with Union Oil

through the term of the second option lease, i.e., April 30. 1989.

The Niakans had planned to convert the site to a different use. When they could not secure an agreement to vacate from appellant, they filed suit in November 1982, seeking a judicial declaration that appellant had no further right to remain on the premises beyond the expiration of his sublease, September 30, 1983.

Appellant cross-complained against the Niakans, the Sheffields and Union Oil. Of the eight causes of action contained in the cross-complaint, only the following five are pertinent to this appeal: The first cause of action, against Union Oil, alleged violation of the federal Petroleum Marketing Practices Act (PMPA), 15 U.S.C. section 2801 et seq., as a result of Union Oil's nonrenewal of appellant's service station franchise. The Niakans are also named as cross-defendants as to the first cause of action for conspiring with Union Oil to

violate appellant's franchise rights under PMPA. The fifth cause of action, against Union Oil, alleged unfair trade practices in violation of California Business and Professions Code section 17200. The sixth and seventh causes of action, against Union Oil, alleged breach of the implied covenant of good faith and fair dealing and breach of written contract. The eighth cause of action, against Union Oil, alleged misrepresentation, as to the duration of appellant's franchise.

At the conclusion of the presentation of evidence, the court directed a verdict against appellant as to each cause of action, except the eighth. The issue of whether Union Oil fraudulently misrepresented the length of appellant's lease was decided by the jury in Union Oil's favor.

On appeal, appellant contends the court made errors of law when it directed verdicts against him as to causes of action 1, 5, 6 and 7; and when it refused his

requested jury instructions on negligent misrepresentation and concealment. Appellant further argues that the bailiff's conduct at trial deprived him of a fair trial.

Union Oil counters that each of the causes of action of which appellant seeks reversal either are directly governed or are pre-empted by the PMPA, and that the federal court has exclusive jurisdiction for any action grounded in the PMPA. Accordingly, the entire appeal should be dismissed for lack of subject matter jurisdiction. We concur.

All parties agree that Union Oil is a petroleum marketing franchisor as defined by PMPA section 2801, subdivision (3), and that the franchise agreement is subject to requirements of the PMPA. All the causes of action, summarized above, stem from Union Oil's failure to renew appellant's petroleum marketing franchise.

Subsequent to trial on this matter, the United States District Court for Centr-

al California has addressed the question of whether the federal courts have exclusive jurisdiction over actions brought under the PMPA. In Rustom v. Atlantic Richfield Co. (C.D.Cal.1985) 618 F.Supp. 210, the court acknowledged the presumption that state courts have concurrent jurisdiction. It noted, however, that this ". . . presumption may be rebutted 'by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.' (Citation.) (Id. at p. 212.) After analyzing the legislative history as well as the language and the requirements of the statute,[2] the court concluded that Congress intended

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[2] The court noted that while the PMPA does not specifically require action to be brought solely in federal district court, both House and Senate reports state that the provisions of the PMPA "are enforceable by private civil action in U.S. District Court"; there is no mention in the reports of bringing PMPA actions in state courts; and the PMPA incorporates standards under the Federal Rules of Civil Procedure to the award of damages and to the issuance of preliminary injunctions.

to vest the federal courts with exclusive jurisdiction over actions brought under the PMPA. (Id. at p. 214.) This holding has been followed in Elimelekh, et al. v. Texaco Refining & Marketing Inc. (C.D.Cal.1986, Business Franchise Guide, ¶ 8663, pp. 16751-16752).

Our research indicates that the body of case law developed under the PMPA consists almost entirely of federal court decisions. Moreover, on two occasions, our appellate court has held that all California state law remedies for wrongful termination or nonrenewal have been pre-empted by the PMPA. (California Arco Distributors, Inc. v. Atlantic Richfield Co. (1984) 158 Cal.App.3d 349, 204 Cal.Rptr. 743; Mobile Oil Corp. v. Superior Court (1987) 189 Cal.App.3d 485, 234 Cal.Rptr. 482; see also 15 U.S.C., § 2806.)

The PMPA is federal legislation applying federal remedies which have been extensively interpreted by federal courts and

jurisdiction. The legislative history of this act (1978 U.S. Code, Cong. & Adm. News, vol. 3, p. 873 et seq.) reveals a strong legislative concern for development of a uniform body of federal law to address the problems associated with termination and nonrenewal of franchise relationship. In addition, it has been held that federal courts retain exclusive jurisdiction over suits brought under the PMPA. (Rustom, supra.) We accept the Rustom court analysis and conclude that our state courts lack jurisdiction.[3] Accordingly, the appeal is dismissed. Each party to bear own costs.

FEINERMAN, P.J., and BOREN, J., concur.

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[3] We have read the record and conclude were this not the case, an affirmance would lie. There is substantial evidence to support the trial court's directed verdicts, and appellant's other contentions are meritless.

APPENDIX B

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

F. NIAKAN, E. NIAKAN, BEN NIAKAN, BOB NIAKAN,	2d Civil No.B015459 (Super. Ct. No. WEC77378)
Plaintiffs and Respondents,	ORDER OF PUBLICATION
v.	COURT OF APPEAL - SECOND DIST. FILED MARCH 17, 1988 ROBERT N. WILSON CLERK
ISSA ELIAS SAMAAN,	
Defendant and Appellant,	
UNION OIL COMPANY OF CALIFORNIA,	
Defendant and Respondent.	

THE COURT:

Good cause appearing, the opinion heretofore filed in the above entitled matter, on February 16, 1988, Not to be Published, is hereby deemed suitable for publication.

Therefore, it is ordered Certified for Publication.

APPENDIX C

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 5, No. B015459
S005069

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

I N B A N K

NIAKAN et al., Respondents,

v.

SAMAAN, Appellant,
UNION OIL CO. OF CALIFORNIA, Respondent.

Appellant's petition for review DENIED.

Mosk, J. and Broussard, J. are of the opinion the petition should be granted.

LUCAS
Chief Justice

APPENDIX D

PETROLEUM MARKETING PRACTICES ACT, 15 U.S.C. §§ 2801-2806

SUBCHAPTER I -- FRANCHISE PROTECTION

§ 2801. Definitions

As used in this subchapter:

(1)(A) The term "franchise" means any contract --

(i) between a refiner and a distributor.

(ii) between a refiner and a retailer,

(iii) between a distributor and another distributor, or

(iv) between a distributor and a retailer,

under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes --

(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled

by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed --

(I) under a trademark owned or controlled by a refiner; or

(II) under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(III) the unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of a motor fuel under a franchise.

(3) The term "franchisor" means a refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a

trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who --

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under said franchise, are to be employed by the franchisee in connection with the sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and

which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of motor fuel.

(10) The term "contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure" does not include --

(A) any failure which is only technical or unimportant to the franchise relationship; or

(B) any failure for a cause beyond the reasonable control of the franchisee.

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship --

(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(B) at any time, in the case of the relevant franchise which does not

state a term of duration or an expiration date; or

(C) following a termination (on or after June 19, 1978) of the relevant franchise which was entered into prior to June 19, 1978, and has not been renewed after such date.

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

(16) The term "relevant geographic market area" includes a State or standard metropolitan statistical area as periodically established by the Office of Management and Budget.

(17) The term "termination" includes cancellation.

(18) The term "commerce" means any trade, traffic, transportation, exchange or other commerce --

(A) between any State and any place outside of such State; or

(B) which affects any trade, transportation, exchange, or other commerce described in subparagraph (A).

(19) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

§ 2802. Franchise relationship

General prohibition against termination or nonrenewal

(a) Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may --

(1) terminate any franchise (entered into or renewed on or after June 19, 1978) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

Precondition and grounds for termination or nonrenewal

(b)(1) Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew any franchise relationship, if --

(A) the notification requirements of section 2804 of this title are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or

constructive knowledge of such failure --

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if --

(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and

(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 2804 of this title.

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first ac-

quired actual or constructive knowledge or such occurrence --

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given pursuant to section 2804(a) of this title; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804(b)(1) of this title.

(D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if --

(i) such agreement is entered into not more than 180 days prior to the date of such termination or, in the case of nonrenewal, not more than 180 days prior to the conclusion of the term, or the expiration date, stated in the franchise;

(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 2804(d) of this title; and

(iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

(E) In the case of any franchise entered into prior to June 19, 1978, and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if --

(i) such determination --

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises --

(I) the franchisor, during the 180-day period after notification was given pursuant to section 2804 of this title, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's

interest in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if --

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship.

(B) The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises, if --

(i) the franchisee was promptly apprised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and

(ii) if such complaints related to the condition of such premises or to the conduct of any employee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

(C) A failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures.

(D) In the case of any franchise entered into prior to June 19, 1978, (the unexpired term of which, on such date, is 3 years or longer) and, in the case of any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the

franchisor in good faith and in the normal course of business, if --

(i) such determination is --

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operations by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 2804 of this title, either --

(I) made a bona fide offer to sell, transfer, or

assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

Definition

(c) As used in subsection (b)(2)(C) of this section, the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as --

(1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;

(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;

(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise --

(A) of the duration of the underlying lease, and

(B) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);

(5) condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain;

(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;

(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;

(9) failure by the franchisee to operate the marketing premises for --

(A) 7 consecutive days, or

(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(10) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;

(11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; and

(12) conviction of the franchisee of any felony involving moral turpitude.

Compensation, etc., for franchisee upon condemnation or destruction of marketing premises

(d) In the case of any termination of a franchise (entered into or renewed on or after June 19, 1978), or in the case of any nonrenewal of a franchise relationship (without regard to the date on which such franchise relationship was entered into or renewed) --

(1) if such termination or nonrenewal is based upon an event described in subsection (c)(5) of this section, the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will; and

(2) if such termination or nonrenewal is based upon an event described in subsection (c)(7) of this section and the leased marketing premises are subsequently rebuilt or replaced by the franchisor and operated under a franchise, the franchisor shall, within a reasonable period of time, grant too the franchisee a right of first

refusal of the franchise under which such premises are to be operated.

§ 2803. Trial and interim franchises

Nonapplicability of statutory nonrenewal provisions

(a) The provisions of section 2802 of this title shall not apply to the nonrenewal of any franchise relationship --

(1) under a trial franchise; or

(2) under an interim franchise.

Definitions

(b) For purposes of this section --

(1) The term "trial franchise" means any franchise --

(A) which is entered into on or after June 19, 1978;

(B) the franchisee of which has not previously been a party to a franchise with the franchisor;

(C) the initial term of which is for a period of not more than 1 year; and

(D) which is in writing and states clearly and conspicuously --

(i) that the franchise is a trial franchise;

(ii) the duration of the initial term of the franchise;

(iii) that the franchisor may fail to renew the franchise relationship at the conclusion of the initial term stated in the franchise by notifying the franchisee, in accordance with the provisions of section 2804 of this title, of the franchisor's intention not to renew the franchise relationship; and

(iv) that the provisions of section 2802 of this title, limiting the right of a franchisor to fail to renew a franchise relationship, are not applicable to such trial franchise.

(2) The term "trial franchise" does not include any unexpired period of any term of any franchise (other than a trial franchise, as defined by paragraph (1)) which was transferred or assigned by a franchisee to the extent authorized by the provisions of the franchise or any applicable provision of State law which permits such transfer or assignment, without regard to any provision of the franchise.

(3) The term "interim franchise" means any franchise --

(A) which is entered into on or after June 19, 1978;

(B) the term of which, when combined with the terms of all prior interim franchises between the franchisor and the franchisee, does not exceed 3 years;

(C) the effective date of which occurs immediately after the expiration of a prior franchise, applicable to the marketing premises, which was not renewed if such nonrenewal --

(i) was based upon a determination described in section 2802(b)(2)(E) of this title, and

(ii) the requirements of section 2802(b)(2)(E) of this title were satisfied; and

(D) which is in writing and states clearly and conspicuously --

(i) that the franchise is an interim franchise;

(ii) the duration of the franchise; and

(iii) that the franchisor may fail to renew the franchise at the conclusion of the term stated in the franchise based upon a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located if the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

Nonrenewal upon meeting statutory notification requirements

(c) If the notification requirements of section 2804 of this title are met, any franchisor may fail to renew any franchise relationship --

(1) under any trial franchise, at the conclusion of the initial term of such trial franchise; and

(2) under any interim franchise, at the conclusion of the term of such interim franchise, if --

(A) such nonrenewal is based upon a determination described in section 2802(b)(2)(E) of this title; and

(B) the requirements of section 2802(b)(2)(E)(ii) and (iii) of this title are satisfied.

§ 2804. Notification of termination or nonrenewal of franchise relationship.

General requirements applicable to franchisor

(a) Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship --

(1) in the manner described in subsection (c) of this section; and

(1) except as provided in subsection (b) of this section, not less than 90 days prior to the date on

which such termination or nonrenewal takes effect.

Additional requirements applicable to franchisor

(b)(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2) of this section --

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

(B) in the case of leased marketing premises, such franchisor --

(i) may not establish a new franchise relationship with respect to such premises before the expiration of the 30-day period which begins --

(I) on the date notification was posted or personally delivered, or

(II) if later, on the date on which such termination or nonrenewal takes effect; and

(ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances under which it would be reasonable to do so, operate such premises through employees or agents.

(2) In the case of any termination of any franchise or any nonrenewal of any

franchise relationship pursuant to the provisions of section 2802(b)(2)(E) of this title or section 2803(c)(2) of this title, the franchisor shall --

(A) furnish notification to the franchisee not less than 180 days prior to the date of which such termination or nonrenewal takes effect; and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

Manner and form of notification

(c) Notification under this section --

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain --

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d) of this section.

Preparation, publication, etc. of statutory summaries

(d)(1) Not later than 30 days after June 19, 1978, the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this subchapter, including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this subchapter.

(2) In the case of summaries required to be furnished under the provisions of section 2802(b)(2)(D) of this title or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days after it is so published rather than at the time required under such provisions.

§ 2805. Enforcement provisions

Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action

(a) If a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of --

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 2802 or 2803 of this title.

Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers

(b)(1) In any action under subsection (a) of this section, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802 or 2803 of this title, including declaratory judgment, mandatory or prohibitive injunction relief, and interim equitable relief.

(2) Except as provided in paragraph (3), in any action under subsection (a) of this section, the court shall grant a preliminary injunction if --

(A) the franchisee shows --

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exists sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) of this section to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(4) In any action under subsection (a) of this section, the court need not exercise its equity powers to compel continuation or renewal of the franchise relationship if such action was commenced --

(A) more than 90 days after the date on which notification pursuant to section 2804(a) of this title was posted or personally delivered to the franchisee;

(B) more than 180 days after the date on which notification pursuant to section 2804(b)(2) of this title was posted or personally delivered to the franchisee; or

(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90 days notification was provided pursuant to section 2804(b)(1) of this title.

Burden of proof; burden of going forward with evidence

(c) In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that

such franchisor complied with the requirements of section 2802(d) of this title.

Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous actions

(d)(1) If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled --

(A) consistent with the Federal Rules of Civil Procedure, to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 2802 or 2803 of this title, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection (a) of this section, the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the

franchisee if the court finds that such action is frivolous.

Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected

(e)(1) In any action under subsection (a) of this section with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 2802 of this title, the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the court that --

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business --

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the pro-

visions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 2804 of this title have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) of this section if such nonrenewal is prohibited by section 2802 of this article.

§ 2806. Relationship of statutory provisions to State and local laws

(a) to the extent that any provision of this subchapter applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

(b) Nothing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without

regard to any provision of the franchise.

APPENDIX E

Article 6, cl. 2

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, Anything in the Constitution or Laws of any State to the Contrary notwithstanding.

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of

section 1446(b) of this chapter may be enlarged at any time for cause shown.

(c) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

Article I, Sec. 8. [Powers of Congress.]

[1.] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

[2.] To borrow money on the credit of the United States.

[3.] To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

[4.] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

[5.] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.

[6.] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States.

[7.] To establish Post Offices and post Roads.

[8.] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

[9.] To constitute tribunals inferior to the Supreme Court.

[10.] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.

[11.] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.

[12.] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.

[13.] To provide and maintain a Navy.

[14.] To make Rules for the Government and Regulation of the land and naval Forces.

[15.] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrection and repel Invasions.

[16.] To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

[17.] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings, And,

[18.] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other

Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.